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No.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,
VS.
MARK ALAN RADKE,
Respondent.

On Petition for Writ of Certiorari
To the California Court of Appeal
Fourth Appellate District, Division One

PETITION FOR WRIT OF CERTIORARI

EDWIN L. MILLER, JR.
District Attorney of
the County of San Diego,
PETER C. LEHMAN
Deputy District Attorney
THOMAS F. MCARDLE
Deputy District Attorney

101 West Broadway, Suite 700
San Diego, California 92101
Telephone: (619) 531-3577
Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-6600

QUESTIONS PRESENTED

1. When a police officer detains a motorist on suspicion of murder, does the Fourth Amendment permit the officer to draw his revolver and order the motorist to get out of his car?

2. When in the course of an otherwise valid detention a police officer observes evidence on the hands of the suspect which gives the officer probable cause to arrest him, does the Fourth Amendment make the observation and the arrest unlawful if the observation was made while the officer was impermissibly handcuffing the suspect?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, The People of the State of California, respectfully prays that a writ of certiorari be issued to review the judgment and opinion of the California Court of Appeal, Fourth Appellate District, Division One, filed on July 29, 1988, in case number D008276, which vacated the order of the Superior Court, in and for San Diego County, which had denied the defendant's motion to exclude evidence on the basis of an alleged Fourth Amendment violation. The People's petition for review by the California Supreme Court was denied on October 13, 1988.

OPINIONS BELOW

The unpublished opinion of the California Court of Appeal in case number D008276 appears as Appendix A

herein. The order of the California Supreme Court denying the People's petition for review appears as Appendix D herein. Other orders relating to this matter appear as Appendices B, C, and E herein. All of the relevant orders are further described in the next section, Jurisdictional Grounds.

JURISDICTIONAL GROUNDS

An order of the Superior Court, in and for San Diego County, filed on May 31, 1988, denied defendant Mark Alan Radke's motion to suppress evidence on Fourth Amendment grounds pursuant to California Penal Code section 1538.5. A copy of that order is Appendix B herein.

On defendant Radke's petition for writ of mandate, the California Court of Appeal, Fourth Appellate District, Division One, in an opinion filed on July 29, 1988, in case Number D008276, vacated the aforesaid order of the Superior Court and ordered the suppression of certain evidence. Petitioner seeks review of that opinion and judgment, a copy of which is Appendix A herein.

On August 18, 1988, the Court of Appeal denied the People's timely petition for rehearing. A copy of the order is Appendix C herein.

On October 13, 1988, the California Supreme Court denied the People's timely petition for review. A copy of the order is Appendix D herein.

On November 3, 1988, on the People's motion to stay the issuance of the remittitur until the United States Supreme Court made a final disposition on the People's petition for writ of certiorari, the California Court of Appeal ordered the remittitur stayed for 30 days. A copy of the order is Appendix E herein.

This petition is filed within 60 days after the denial on October 13, 1988, of the People's petition for review by the California Supreme Court, and is therefore timely.

This Court's jurisdiction to review the judgment in question by writ of certiorari is conferred by the Act of June 25, 1948, chapter 646, 62 Statutes 929 (28 U.S.C. § 1257(3)).

The decision of the California Court of Appeal is a "final judgment" within the meaning of 28 U.S.C. section 1257(3) because if respondent is convicted at trial petitioner's claim will be rendered moot, and if respondent is acquitted petitioner will be unable to press its claim on appeal (see *New York v. Quarles* (1984) 467 U.S. 649, 651, n. 1 [81 L.Ed.2d 550]).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the following provision of the United States Constitution, Fourth Amendment: "The right of the people to be secure in their persons, ... against unreasonable searches and seizures, shall not be violated ...." This provision is made applicable to the states through the Due Process Clause of the Fourteenth Amendment.

STATEMENT OF THE CASE

A. SUMMARY OF MATERIAL FACTS

Sixteen-year-old Jeffrey Rudiger left work early on the evening of January 21, 1988. (R.T. pp. 179-180, 192-193.)[1]

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[1]"R.T." refers to the Reporter's Transcript of the preliminary examination which was used as the evidentiary basis of the Superior Court's ruling which denied the defendant's motion to suppress evidence on Fourth Amendment grounds.

Before leaving work he told his friend and co-worker, Justin Valdivia, that he was going to meet with Mark Radke that evening. (R.T. pp. 120-127.)

Rudiger's body, badly beaten, slashed, and only partially clothed, was found in an alley the next morning. (R.T. p. 6-7, 180-181.) Two blood-covered knives were found about 20 feet from the body. (R.T. pp. 101-102, 108.)

San Diego Police Department homicide detectives examined the crime scene and photographed tire tracks which ran through pools of blood next to the victim's body. (R.T. pp. 7, 20, 91-92.). On the same day, January 22, they learned that Valdivia told a fellow officer, Carnahan, of Rudiger's plan to meet with Radke on the night of the murder. (R.T. p. 8.)

On the evening of January 22, the detectives located Radke's car in a public parking lot. They examined its tire treads and concluded they matched the bloody tire tracks at the crime scene. (R.T. pp. 9, 20, 47-49.)

Later that evening two of the detectives, Sgt. James Manis and Jerry Wiggins, saw Radke exit a house, enter his car, and drive away. The detectives followed him to an intersection where he stopped behind some other cars at a red light. (R.T. pp. 12, 64.)

The detectives got out of their car and approached him. Sgt. Manis did not draw his pistol. Wiggins drew his pistol but did not point it at Radke. (R.T. pp. 12-13, 26, 64.) There was no evidence that Radke ever saw Wiggins' drawn weapon. Manis displayed his badge, identified himself, and asked Radke to turn off his engine and step out of his car. Manis explained they wanted to talk to him about the death of Jeffrey Rudiger. (R.T. pp. 12-13.)

As Sgt. Manis and Radke walked back to the passenger side of the detectives' car, Radke asked whether he was under arrest. Manis replied, "No. We just want to interview you and talk to you about the death of Jeff Rudiger." Radke said, "Okay." (R.T. p. 13.)

Sgt. Manis told Radke that he was putting him in the rear seat and, because it was not a "cage" car, Manis was required to put handcuffs on him. Manis also told him that if Radke agreed not to do anything stupid, Manis would cuff his hands in front so he would be more comfortable. Radke agreed, and that procedure was followed. (R.T. p. 13.) Manis told Detective Wiggins to move Radke's car out of the traffic lanes. (R.T. pp. 13-14.)

During the handcuffing Sgt. Manis noticed the knuckles on both of Radke's hands were swollen, one hand had several scratches, and there was a laceration on the palm. It appeared to Manis that Radke had been in a fight. (R.T. p. 14.)

A few minutes later patrol officers arrived. Sgt. Manis directed them to take Radke to the police station and to impound Radke's car. (R.T. pp. 13-14, 26.)

During custodial interrogation at the police station Radke admitted he was the only driver of his car on the night of the murder. During the interrogation the police seized his jacket because it bore apparent bloodstains on the sleeves. They also obtained his consent to search his car, and they took a sample of his blood. (R.T. pp. 15, 50-55.)

Examination of the car revealed it bore blood of the victim's type, not the suspect's, under the wheel wells and on the floormat and on a cardboard dashboard protector. Radke's jacket also had diffused traces of the victim's type of blood. (R.T. pp. 135-141.) A criminalist's compari-

son of Radke's tire treads with the bloody tire tracks showed Radke's tires were consistent with the tracks. (R.T. pp. 86-87, 155-165.)

B. PROCEDURAL HISTORY

On February 5, 1988, a felony complaint was filed in the Municipal Court, San Diego Judicial District, accusing Mark Alan Radke of the murder of Jeffrey Vance Rudiger on January 21, 1988. The defendant was arraigned on the complaint on the same day and pleaded not guilty.

On April 5, 1988, a magistrate conducted a preliminary hearing on the complaint. During the course of the hearing the defendant, by his counsel, moved to suppress evidence offered against him on the ground it was obtained by an unlawful arrest of the defendant in violation of the Fourth Amendment of the United States Constitution. The magistrate denied the motion and held the defendant to answer the charge of murder in the Superior Court.

On April 19, 1988, an information was filed in the Superior Court, in and for San Diego County, accusing the defendant of the same murder. The defendant was arraigned on the information on the same day and pleaded not guilty. Trial was thereupon set for August 15, 1988. The defendant was subsequently released upon the posting of a bail bond in the amount of $300,000.

On May 10, 1988, the defendant filed a renewed motion in Superior Court to suppress the evidence on Fourth Amendment grounds. On May 24, 1988, the People filed a brief in opposition to the motion.

On May 31, 1988, a pretrial hearing was held on the motion in the Superior Court, the Honorable J. Perry Langford presiding. Pursuant to the provisions of Cali-

fornia Penal Code Section 1538.5(i), the transcript of the preliminary hearing was used as the evidentiary basis of the motion. The motion was denied.

On June 23, 1988, the defendant filed a petition for writ of mandate in the California Court of Appeal. The People filed an answer to the petition on July 5, 1988. A divided Court of Appeal granted the writ on July 29, 1988, with Todd, J., expressing his opinion the police conduct was reasonable and the petition should be denied.

On August 5, 1988, on defendant's motion and by stipulation of the parties, the Superior Court vacated the trial date of August 15, and ordered the trial to be stayed until receipt of a remittitur from the Court of Appeal. That stay continues in effect, and there is no scheduled trial date at this time.

On August 15, 1988, the People filed a petition for rehearing in the Court of Appeal. On August 18, the defendant filed an answer to the petition, and the Court of Appeal denied the petition on the same day.

On September 7, 1988, the People filed a petition for review in the California Supreme Court. The petition was denied on October 13, 1988, with Kaufman, J., expressing his opinion the petition should be granted.

On October 18, 1988, the People filed a motion in the California Court of Appeal to stay the issuance of the remittitur until this Court makes a final disposition of the People's petition for writ of certiorari. On November 3, 1988, the California Court of Appeal stayed the issuance of the remittitur for 30 days only.

C. HOW THE FEDERAL QUESTION WAS PRESENTED

California no longer has an independent state ground for the exclusion of evidence as a result of an allegedly unreasonable search or seizure. The addition on June 8, 1982, of Article I, section 28(d) to the California Constitution permits California courts to exclude evidence on search and seizure grounds only if the search or seizure violated the Fourth Amendment of the United States Constitution (see *In re Lance W.* (1985) 37 Cal.3d 873).

Accordingly, in the instant case the California Court of Appeal stated, "The issue here must be decided under federal law" (slip opinion, p. A-3, line 1). It concluded there was a "violation of the defendant's Fourth Amendment rights" (slip opinion, p. A-5, lines 32-33).

REASONS FOR GRANTING REVIEW

This case falls within the provisions of Rule 17.1(c), Rules of the Supreme Court of the United States: A state court has decided a federal question in a way in conflict with applicable decisions of this Court.

The California Court of Appeal decision in this case is in direct conflict with this Court's decision in *United States v. Hensley* (1985) 469 U.S. 221 [83 L.Ed.2d 604]. There, a police officer drew his pistol and ordered two armed-robbery suspects out of their vehicle during a "Terry stop." This Court held such safety precautions were permissible under the circumstances.

However, in the instant case the California Court of Appeal held a police officer may not draw his pistol and order a driver out of his car even though he has an undisputed right to detain the driver on a reasonable suspicion he had committed murder with deadly weapons.

The Court of Appeal decision in this case also conflicts with decisions of this Court which hold the Fourth Amendment does not protect a person's physical characteristics which are exposed to the public; e.g., *Katz v. United States* (1967) 389 U.S. 347 [19 L.Ed.2d 576]; *United States v. Dionisio* (1973) 410 U.S. 1 [35 L.Ed.2d 67]; *United States v. Knotts* (1983) 460 U.S. 276 [75 L.Ed.2d 55].

In this case the police had an undisputed right to detain the murder suspect and, during that detention in a public place, they observed injuries on his hands which gave them probable cause to arrest him. Nevertheless, the Court of Appeal suppressed the observation as unlawful, held the suspect was unlawfully arrested, and remanded the matter to the trial court for suppression of vital evidentiary products of the arrest.

The decision of the California Court of Appeal inflicts severe and probably fatal damage to this murder prosecution. The decision directly suppresses evidence of the defendant's hand injuries which are circumstantial evidence of his beating and slashing the victim. However, its finding that the defendant's arrest was unlawful is even more significant.

The defendant's arrest directly produced an incriminating admission during his interrogation and physical evidence linking him to the crime. Although the Court of Appeal's decision remands the matter to the trial court to determine whether the link between the arrest and the aforesaid evidence is attenuated, the result of a further hearing is quite predictable. There is no evidence of attenuation. Accordingly, the finding of an unlawful arrest effectively requires the trial court to suppress all the evidence obtained from the defendant at the police station. That evidence is essential to this prosecution.

This is the most appropriate time for review by this Court. The People have exhausted their remedies in the state courts on the issues of the legality of the arrest and the observation of the defendant's injured hands. Further proceedings in the state courts cannot undo the damage done by the Court of Appeal decision. Moreover, the decision is patently inconsistent with this Court's binding precedents. Accordingly, this is an appropriate case for summary reversal (see *Pennsylvania v. Bruder,* No. 88-161, decided October 31, 1988).

Finally, this case presents this Court with an opportunity to make it unmistakably clear to all other courts that the principle articulated in *Katz v. United States, supra, United States v. Dionisio, supra,* and *United States v. Knotts, supra,* applies with full force in the circumstances of a detention. That is, the Fourth Amendment does not protect those personal characteristics which a person exposes to public view. Although this principle has been applied to detentions by some courts (see cases collected in 3 W. LaFave, § 9.2, p. 376, n. 115), the result in the instant case makes it apparent that not all courts recognize the principle applies to observations made during a detention. For that reason, too, the petition for writ of certiorari should be granted.

ARGUMENT

THE FOURTH AMENDMENT PERMITS A POLICE OFFICER TO DRAW HIS WEAPON AND ORDER A MOTORIST SUSPECTED OF MURDER TO GET OUT OF HIS CAR. THE FOURTH AMENDMENT DOES NOT REQUIRE NOR PERMIT SUPPRESSION OF THE OFFICER'S OBSERVATION OF THE SUSPECT'S EXTERNAL PHYSICAL CHARACTERISTICS DURING THE ENSUING DETENTION, EVEN IF THE OBSERVATION WAS MADE WHILE THE OFFICER WAS IMPERMISSIBLY HANDCUFFING THE SUSPECT.

The California Court of Appeal recognized Sgt. Manis and Detective Wiggins had a right to detain and question Mark Radke as a suspect in the murder of Jeffrey Rudiger. From that promising beginning, however, the Court proceeded to condemn every step taken by the police during the detention, and ultimately concluded they unlawfully arrested him and unlawfully observed what was in plain sight.

Except for its initial recognition of the right to detain, every one of the Court of Appeal's conclusions in this case is in conflict with applicable decisions of this Court. Petitioner will briefly examine each in sequence.

The detention began when the detectives approached Radke's car, which was stopped in a traffic lane for a red light, and ordered him out of his car. The Court of Appeal stated the police were not authorized to order him to emerge from his car.

In *Pennsylvania v. Mimms* (1977) 434 U.S. 106 [54 L.Ed.2d 331] this Court held the Fourth Amendment permits an officer, upon stopping a motorist for a traffic violation, to order the motorist to emerge. Because a

seated motorist and passing traffic both pose substantial hazards to the officer, the interest in the officer's safety outweighs the minimal intrusion on the motorist's liberty involved in the order to get out of the car. The Court of Appeal did not discuss nor even cite this decision.

The Court of Appeal also stated the officers were not authorized to order Radke out of the car at gunpoint. This assertion not only contains an unsupported implication that a gun was pointed at Radke, it misstates the law.

In *United States v. Hensley* (1985) 469 U.S. 221 [83 L.Ed.2d 604] Kentucky officers made a "Terry stop" of two men in a car based upon information in a wanted flyer that the driver was wanted for investigation of armed robbery. One officer approached the car with his revolver drawn and ordered the men to exit the car. A second officer looked into the car and observed a partially concealed pistol. This Court approved the conduct of both officers:

> "When the Covington officers stopped Hensley, they were authorized to take such steps as were reasonably necessary to protect their personal safety and to maintain the status quo during the course of the stop. The Covington officers' conduct was well within the permissible range in the context of suspects who are reported to be armed and dangerous. See Michigan v. Long, 463 US 1032, 1049-1050, 77 L Ed 2d 1201, 103 S Ct 3469 (1983); Pennsylvania v. Mimms, 434 US 106, 101-111, 54 L Ed 2d 331, 98 SCt 330 (1977) (per curiam)." (*United States v. Hensley, supra,* 469 U.S. at p. 235.)

The Court of Appeal did not discuss or even cite this decision. Instead, it presented the police with a Hobson's choice: Draw your weapon and risk a judicial decision

that the act transforms a lawful detention into an unlawful de facto arrest, or keep your weapon in its holster and risk being shot (see *United States v. Jackson* (2d Cir. 1981) 652 F.2d 244, 249-250). The Court of Appeal's decision is irreconcilable with this Court's view of reasonable police precautions in a detention.

The Court of Appeal next appears to criticize the officers for not questioning the suspect immediately after ordering him out of the car. This criticism conflicts with decisions of this Court which permit the police to take protective measures *before* questioning the suspect.

In *Terry v. Ohio* (1968) 392 U.S. 1 [20 L.Ed.2d 889] this Court approved the officer's frisk of the suspects after he had only asked for their names. In his concurring opinion Justice Harlan emphasized the right of the officer, under appropriate circumstances, to take protective measures before asking questions.

> "Where such a stop is reasonable, however, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence. Just as a full search incident to a lawful arrest requires no additional justification, a limited frisk incident to a lawful stop must often be rapid and routine. There is no reason why an officer, rightfully but forcibly confronting a person suspected of a serious crime, should have to ask one question and take the risk that the answer might be a bullet." (*Terry v. Ohio, supra*, 392 U.S. at p. 33.)

Justice Harlan's view was followed in *Adams v. Williams* (1972) 407 U.S. 143 [32 L.Ed.2d 612] where the Court approved the officer's removal of a pistol from the suspect's waistband before asking him any questions.

Similar police conduct was approved in *Michigan v. Long* (1983) 463 U.S. 1032 [77 L.Ed.2d 1201].

In *United States v. Sharpe* (1985) 470 U.S. 675 [84 L.Ed.2d 605] Officer Thrasher drew his revolver, ordered the suspect Savage out of his truck, and immediately patted him down for weapons without asking any questions. The reasonableness of such precautions is now so generally recognized that it was not even questioned by the lower appellate court (see 470 U.S. at p. 683), and only the length of the detention was at issue.

Finally, the Court of Appeal condemned the handcuffing of the suspect. It opined the "[u]se of the gun and handcuffs turned what should have been a legal detention into an illegal arrest" (slip opinion, p. A-3, lines 30-32). It held the police viewing of the injuries on the suspect's hands must be suppressed, apparently because the viewing coincided in time with the handcuffing.

Petitioner is not aware of any decisions of this Court which specifically discuss or decide whether the use of handcuffs may be justified during a detention. However, other courts have approved such conduct in certain circumstances (see 3 W. LaFave, Search and Seizure, § 9.2, p. 367).

This Court has stated that "common sense and ordinary human experience must govern over rigid criteria" in distinguishing a lawful detention from an unlawful de facto arrest. (*United States v. Sharpe, supra,* 470 U.S. at p. 685). There is no "litmus-paper test" for such a determination. (*Florida v. Royer* (1983) 460 U.S. 491, 506 [75 L.Ed.2d 229].)

Common sense justifies the use of handcuffs in this case. The detectives could not conduct an interview in the traffic lane because of the obvious hazard of passing cars.

Accordingly, the suspect's car, the detectives' car, the suspect, and the two detectives all had to be moved out of harm's way. The officers selected a method for the movement which was most consistent with officer safety. By handcuffing and placing the suspect in the detectives' car, the officers prevented him from fleeing or obtaining a weapon from his own car.

Although an arguably less intrusive means of accomplishing the movement out of the traffic lane may be conceived in hindsight, that possibility does not make the police conduct unreasonable (see *United States v. Sharpe, supra,* 470 U.S. at pp. 686-687), nor convert the detention into an arrest.

Here, the police told the suspect he was *not* under arrest, and that the handcuffs were being used because he was being put in a car which lacked a protective barrier, a so-called "cage." Moreover, he was handcuffed in front for his comfort, rather than with his hands behind his back as is standard practice with arrested persons. Accordingly, petitioner submits the use of handcuffs did not transform the detention into an arrest.

In any event, this Court need not determine the propriety of handcuffing in this case. The central issue is not handcuffing. The issue is the propriety of the police observation of the suspect's injured hands. That observation, combined with antecedent information, clearly gave the police probable cause to arrest Radke.

The Court of Appeal ordered suppression of the police observation of the suspect's hands because of an alleged Fourth Amendment violation. That order is in direct conflict with this Court's holding in *United States v. Dionisio* (1973) 410 U.S. 1, 14 [35 L.Ed.2d 67]:

> "In Katz v. United States, supra, we said that the Fourth Amendment provides no protection for what a person knowingly exposes to the public, even in his own home or office . . . ." 389 US, at 351, 19 L Ed 2d 576. The physical characteristics of a person's voice, its tone and manner, as opposed to the content of a specific conversation, are constantly exposed to the public. Like a man's facial characteristics, or handwriting, his voice is repeatedly produced for others to hear. No person can have a reasonable expectation that others will not know the sound of his voice, any more than he can reasonably expect that his face will be a mystery to the world."

Sgt. Manis had an unquestionable right to observe Radke where he did, on a public street. Radke's external physical characteristics, including his injured hands, were in plain sight and exposed to public view. Thus, the observation of his hands cannot be said to have been the product of either a search or a seizure within the scope of the Fourth Amendment. Instead, the observation was a product of Radke's decision to place himself within public view. Accordingly, the observation was legitimately obtained and it justified the ensuing arrest.

By granting a writ of certiorari in this case this Court can establish a bright-line rule that the Fourth Amendment permits police to examine the external physical characteristics of a suspect during a detention.

The Court of Appeal's decision is also in direct conflict with this Court's decision in *United States v. Payner* (1980) 447 U.S. 727 [65 L.Ed.2d 468]. That case reiterated the rule that search and seizure issues are generally determined by a two-step process. The first question is whether the case involves a protected privacy interest of the defendant. If it does, then and only then, a second

question is asked: was a police intrusion on that interest reasonable or warranted?

In the instant case, the suspect had no privacy interest in the appearance of his hands in a public place. The specific conduct of the police which produced the evidence was merely looking at the suspect's hands in a public place. Such conduct is not an intrusion within the scope of the Fourth Amendment. Accordingly, the reasonableness of other conduct by the police (e.g., handcuffing) is irrelevant to the analysis and need not be determined.

The Court of Appeal wrongly assumed a mere temporal coincidence between the handcuffing and the observation of the hands was significant of a cause-and-effect relationship for purposes of Fourth Amendment analysis. In other words, the Court impliedly reasoned the observation must be suppressed because it would not have been made but for the illegal handcuffing.

The so-called "but for" test was rejected by this Court in *Wong Sun v. United States* (1963) 371 U.S. 471, 487-488 [9 L.Ed.2d 441]:

> "We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959)."

The hand-injury evidence in this case came to light by means of looking at the suspect, not by handcuffing him. The temporal coincidence of those police actions was pure

happenstance, a more fortuity. The handcuffing was not the sine qua non or indispensable cause of the discovery of the hand injuries, but was at most a contributing cause (see "Maguire, How to Unpoison the Fruit — The Fourth Amendment and the Exclusionary Rule, 55 J.Crim.L.C. and P.S. 307 (1964)). Accordingly, the observation should not have been suppressed.

CONCLUSION

The decisions of this Court establish the officers acted reasonably in detaining the suspect in this case. Moreover, this Court's decisions hold the Fourth Amendment does not protect a person's physical characteristics which are exposed to public view.

Nevertheless, the California Court of Appeal has ignored those decisions and held to the contrary. The effect of the Court of Appeal's decision is to nullify this Court's authority and to render its decisions of no force and effect in this appellate district.

Accordingly, petitioner requests this Court to summarily reverse the California Court of Appeal, to vacate the finding that Mr. Radke was unlawfully arrested, to vacate the order suppressing the police viewing of his hands, and

to vacate the order remanding the case to the Superior Court for a further hearing on the question of attenuation.

Dated: November 30, 1988

Respectfully submitted,

EDWIN L. MILLER, JR.
District Attorney of the
County of San Diego,
State of California
PETER C. LEHMAN
Deputy District Attorney

By: THOMAS F. MCARDLE
Deputy District Attorney
Attorneys for Petitioner

APPENDIX A

Opinion and Judgment of the California Court of Appeal, Fourth Appellate District, Division One, July 29, 1988

APPENDIX A

NOT TO BE PUBLISHED IN OFFICIAL REPORTS
COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D008276
(Super. Ct. No. CR94248)

MARK ALAN RADKE,
Petitioner,
v.
SUPERIOR COURT, ETC.,
COUNTY OF SAN DIEGO,
Respondent.

THE PEOPLE,
Real Party in Interest.

Filed July 29, 1988 in the Court of Appeal, Fourth District.

PROCEEDINGS in mandate after denial of a Penal Code section 1538.5 motion, Perry J. Langford, Judge. Writ granted.

On January 21, 1988, Jeffrey Rudiger, age 16, took a work break and visited with his friend Justin who worked at a nearby Chuck E. Cheeze. Rudiger told Justin he was going to meet Mark Radke after work to help him with a project. Rudiger left work between 8:00 and 8:30 p.m. telling a co-worker he had a project to do with someone at Chuck E. Cheeze. Radke works at Chuck E. Cheeze.

Early in the morning of January 22, 1988, Rudiger was reported missing. His lifeless body was found about 9:00 a.m. that day with stab wounds and trauma. There was a

great deal of blood at the scene with tire tracks through the puddles of blood near the body.

The detectives learned that Justin thought Rudiger was meeting Radke after work. They went to Chuck E. Cheeze the evening of the 22nd and found Radke's car in the parking lot. An inspection of its tires showed a tire tread pattern the same as the one in the pools of blood where Rudiger was found. The detectives retired to plan their strategy and failed to notice when Radke got in the car and drove away. They later located Radke's car parked at a friend's and followed it at approximately 10:00 p.m. when Radke left the premises. When Radke stopped for a red light, two detectives in civilian clothes stopped behind, got out of their unmarked car and approached Radke. One officer had his gun drawn. Radke was ordered out of the car. He got out and while walking with the officer back to the police car Radke asked if he was under arrest. The officer said no but they wanted to talk to him about Rudiger's death. The officer explained that because this was an unmarked car without a cage he would have to handcuff him. However, if Radke promised not to do anything stupid the officer said he would handcuff his hands in front rather than in back. While handcuffing Radke the officer noted the knuckles on both of Radke's hands were swollen. He had several scratches on one hand and a laceration in the palm of his hand. Radke's car was impounded.

At headquarters he was Mirandized (see *Miranda v. Arizona* (1966) 384 U.S. 436, 467-473) and questioned for an hour. During that time he gave written consent to a search of his car. The officers took his jacket on which there appeared to be blood stains. When one officer accused Radke of the crime, he asked for a lawyer. The questioning stopped and Radke was taken home.

The issue here must be decided under federal law. Federal standards provide the police may make an investigatory stop when there is a reasonable suspicion based on specific and articulable facts of criminal activity. Thus, in circumstances where there is less than probable cause to arrest the police may stop and briefly detain a person for questioning or other limited investigation. (*Terry v. Ohio* (1967) 392 U.S. 1, 43.) If during a detention facts are developed which ripen into probable cause that the person committed a crime the officers have the authority to arrest the person and to take him to the station for further interrogation. (*Hayes v. Florida* (1985) 470 U.S. 811, 816; *Dunaway v. New York* (1979) 442 U.S. 200, 213-216). Here the officers knew the victim said he was meeting Radke after work and tire tracks left in pools of blood near the body appeared to be the same as the tire tread patterns of the tires on Radke's car. This created a reasonable suspicion for the officers to detain him briefly and question him at the scene. However, a reasonable suspicion to investigate does not authorize the police to approach a car at gun point and order the occupant to emerge. No reasonable person in defendant's situation would believe he could ignore the gun and request to exit the vehicle and continue driving. Nor does a reasonable suspicion authorize the officers to handcuff the defendant. After ordering Radke from the car the officers did not question him in an attempt to develop probable cause. Radke did nothing that would add to the officers' suspicion and elevate it to probable cause. (See *People v. Brown* (1985) 169 Cal.App.3d 159, 166-167.) Use of the gun and handcuffs turned what should have been a legal detention into an illegal arrest in violation of the defendant's Fourth Amendment rights. The viewing of defendant's hands occurred while the officers were, without probable cause, handcuffing Radke. Although both parties

concede this evidence along with that giving rise to the initial suspicion when taken together provide probable cause for arrest, the viewing of the hands must be suppressed as a product of the illegal seizure. Thus, there was no probable cause for arrest. The Penal Code section 1538.5 motion should have been granted unless the written consent to search the car and to produce the contents of his pockets are sufficiently attenuated to escape the illegal taint. (*Wong Sun v. United States* (1962) 371 U.S. 471, 491.) This issue was presented, but not resolved by the trial court. The case must be remanded to Superior Court for hearing and ruling on the question of attenuation.

An alternative writ or order to show cause would add nothing to the presentation. A peremptory writ is proper. (Code Civ. Proc., § 1088; *United Nuclear Corp. v. Superior Court* (1980) 113 Cal.App.3d 359; *Goodenough v. Superior Court* (1971) 18 Cal.App.3d 692, 697.)

Let a peremptory writ issue directing the superior court to vacate its denial of the Penal Code section 1538.5 motion and to calendar a hearing at its earliest convenience on the question of attenuation.

/s/ Work, J.
Work, J.

I CONCUR:

/s/ Wiener
Wiener, Acting P. J.

I respectfully dissent. The only question, I believe, is the propriety of the handcuffing. Here the police had no standard "caged" back seat and it is reasonable for the officers, in the interest of their own safety, to handcuff the defendant in the open vehicle. I would deny the petition.

/s/ Todd

TODD, J.

APPENDIX B

Order of the Superior Court, in and for San Diego County, May 31, 1988

APPENDIX B

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO

Case No. CR 94248
DA B32907

THE PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff,

v.

MARK ALAN RADKE,
Defendant.

Hearing Date: May 31, 1988 1:30 p.m. Cal. No. 2 Department 15.

Filed May 31, 1988, Robert D. Zumwalt, Clerk, By S. Kirchman, Deputy.

ORDER OF COURT

This matter came on regularly for hearing on May 31, 1988.

Appearances and proceedings were as set forth in the minutes of that date.

IT IS ORDERED:

The PC 995 motion is denied. It is derivative of the PC 1538.5 motion.

The PC 1538.5 motion is denied.

Defense counsel's declaration is inadequate to establish good cause for the taking of addtional defense evidence.

The defense concedes, as it must, that the information from Valdivia, plus the tire tracks justified a temporary

detention of the defendant. (P's & A's 9) The record before the court does not suggest that the subsequent discovery could change this conclusion. The addition of the hand injuries provided probable cause for an arrest, whether it was actually made or not. It also provided probable cause to search defendant's car under the automobile exception to the warrant requirement. The real issue, then, is whether the officers violated the Fourth Amendment when they saw his hands. They were dealing with a possible murder suspect, so concern for their safety was reasonable. The court concludes the handcuffing, done as it was done, did not violate the Fourth Amendment. Secret intentions of the police do not violate the Fourth Amendment.

The motion for discovery is granted. The People are ordered to treat defendant's motion as a request for discovery and to provide the defense with all the discovery required by law. They need not provide anything not required by law. If the People have in their possession materials which are within the scope of the defense requests, but which the People do not believe are discoverable, they shall advise the defense of the existence of such materials with sufficient particularity as to permit the presentation of a motion. In the event the parties, after conferring, have actual disputes as to the discoverability of particular existing materials, the court will resolve justiciable controversies, upon the presentation of moving papers explicitly setting them out.

Dated: May 31, 1988.

/s/ J. Perry Langford

J. PERRY LANGFORD
Judge of the Superior Court

APPENDIX C

Order of the California Court of Appeal, Fourth Appellate District, Division One, August 18, 1988

APPENDIX C

COURT OF APPEAL
FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

D008276
(SUPER. CT. NO. CR94248)

MARK ALAN RADKE,
Petitioner,

v.

SUPERIOR COURT, etc.,
COUNTY OF SAN DIEGO,
Respondent.

THE PEOPLE,
Real Party in Interest.

Filed August 18, 1988, Court of Appeal Fourth District.

THE COURT:

Real party's petition for rehearing is denied.

/s/ Wiener
WIENER, Acting P.J.

Copies to: All Parties

APPENDIX D

Order of the California Supreme Court, October 13, 1988

APPENDIX D

Order Denying Review
After Judgment by the Court of Appeal

4th District, Division 1, No. D008276
S007128

IN THE SUPREME COURT OF
THE STATE OF CALIFORNIA

IN BANK

MARK ALAN RADKE,
Petitioner,
v.
SUPERIOR COURT OF THE COUNTY OF SAN DIEGO,
Respondent;

PEOPLE,
Real Party in Interest.

Filed October 13, 1988 in the Supreme Court, ... Clerk.

Petition for review of Real Party in Interest DENIED.

Kaufman, J., is of the opinion the petition should be granted.

LUCAS,
Chief Justice

APPENDIX E

**Order of the California Court of Appeal,
Fourth Appellate District,
Division One,
November 3, 1988**

APPENDIX E

COURT OF APPEAL — STATE OF CALIFORNIA FOURTH APPELLATE DISTRICT

DIVISION ONE

D008276
SUPER. CT. NO. CR94248

MARK ALAN RADKE,
Petitioner,
v.
SUPERIOR COURT, etc.,
COUNTY OF SAN DIEGO,
Respondent.

THE PEOPLE,
Real Party in Interest.

Filed November 3, 1988 in the Court of Appeal, Fourth District, Stephen M. Kelly, Clerk.

THE COURT:

Real Party in Interest's Motion to Stay Remittitur, filed October 18, 1988, is GRANTED. The issuance of the remittitur is stayed for 30 days from the date of this order.

Wiener
Acting Presiding Justice

cc: All Parties

ORIGINAL

Supreme Court, U.S.
FILED
DEC 15 1988
JOSEPH F. SPANIOL, JR.
CLERK

CRIMINAL

No. 88-914

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER

v.

MARK ALAN RADKE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE
DISTRICT, DIVISION ONE

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BEST AVAILABLE COPY

QUESTION PRESENTED

1. Whether a citizen's warrantless seizure, without probable cause, for the purpose of custodial interrogation, violated the Fourth Amendment of the U.S. Constitution and the rule of Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d. 824].

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1. There is no reason for this Court to review the unpublished decision of an intermediate state court of appeal when the decision is based upon a factual finding with no applicability beyond the instant case.

2. The California Court of Appeal complied with Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d 824] where respondent was seized without probable cause, for the purpose of custodial interrogation, in violation of the Fourth Amendment.

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No. 88-914

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,

PETITIONER

-v-

MARK ALAN RADKE,

RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL FOURTH APPELLATE
DISTRICT, DIVISION ONE

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent, Mark Alan Radke, respectfully requests that petitioner's request for a writ of certiorari seeking review of the unpublished opinion of the Court of Appeal of the State of California, Fourth Appellate District, Division One, be denied.

STATEMENT OF THE CASE

Respondent concurs with the petitioner's presentation of the procedural history of the case except to note that respondent filed his motion to suppress evidence, and points and authorities in support thereof, prior to the April 5, 1988 preliminary hearing. Petitioner did not file a response.

The California Court of Appeal stayed the issuance of the remittitur until December 15, 1988.

STATEMENT OF THE FACTS

In the early morning hours of January 22, 1988, the family of Jeffrey Vance Rudiger, age sixteen, filed a missing person report with the San Diego Police Department. Mr. Rudiger was a responsible high school student who came home after either school or work, but who failed to return home on the evening of the 21st. Rudiger was last seen by friends leaving his place of employment, a hair-cutting store, between 8-8:30 P.M., on the evening of January 21, 1988 (PHT 8, 193).[1/]

Police began to investigate the missing person report and learned from Rudiger's friend Justin Valdivia that he planned to meet "Mark" after work. Police soon discovered Rudiger's car located in a parking lot near Chuck E. Cheeze restaurant and near the hair-cutting store where Rudiger was employed.

On January 22, 1988, at 9:10 A.M., officers of the San Diego Police Department were dispatched to 10695 Treena Street, in the Scripps Ranch area of San Diego, regarding the discovery of a body of a white male juvenile. Officers discovered the deceased lying in the driveway of a commercial complex at that address.

[1/] PHT refers to the preliminary hearing transcript. RT refers to the Superior Court Transcript. California Penal Code section 1538.5(i) authorizes the Superior Court to consider the transcript of the preliminary hearing at the special hearing on the motion to suppress evidence.

The victim appeared to have suffered stab wounds and other types of trauma over his head and body. He was identified as the missing Jeffrey Rudiger.

At the scene, police observed tire tread marks in blood near the body (PHT 7).

Detectives determined that Mark Radke (respondent) worked at Chuck-E-Cheeze and decided to contact him concerning the homicide.

At approximately 7:30 P.M. on the evening of January 22, 1988, Sgt. James Manis and Detective Gary Murphy viewed the tires on Radke's car while it was parked at Chuck-E-Cheeze restaurant (PHT 20, 48). The officers were aided by a flashlight (PHT 22). The front tires of Radke's car appeared to be the same or similar to the tread pattern found at the scene (PHT 9, 22, 23, 48). While the police waited for Radke, he left work and drove off without being noticed. A short time later, police located Radke's car at the home of a friend. They waited until Radke came out of the home and proceeded to follow him. At 10:00 P.M., Radke stopped at a traffic light on Mira Mesa Boulevard. Detectives were behind him in their unmarked car and called for a marked patrol unit. Sgt. Manis and Detective Jerry Wiggins, both in civilian attire, decided to get out of their car and approach Radke. They both approached from the driver's side and Wiggins had his gun drawn (PHT 13).[2/] Radke was not free to leave once police approached the car (PHT 25).

[2/] Sgt. Manis testified that Detective Wiggins had his gun drawn and that it was the usual practice to point the pistol at the suspect's body so he would notice it (PHT 25). Wiggins recalled drawing the gun, but didn't recall whether he pointed it at Radke (PHT 64).

Radke submitted a declaration, under penalty of perjury, prior to the preliminary hearing, that police approached "with guns drawn and pointed at my head, and told me to get out of the car." The People failed to file a responsive pleading to the motion to suppress in Municipal Court and never challenged Radke's declaration or moved to strike it. California Code of Civil Procedure Sections 2009 and 2015.5 sanction the use of affidavits and declarations in support of a motion.

He was told to turn off the engine and to get out of the car (PHT 12). Manis and Radke walked back to the detective's car where Radke was handcuffed and placed in the car. While Manis was handcuffing Radke he noticed Radke's hands appeared bruised (PHT 14).

A few minutes later, a marked patrol car arrived at the scene. Radke was transferred to the marked patrol car and transported to the San Diego Police Department. The Toyota Celica was impounded by the police (PHT 14).[3/] Radke remained handcuffed during the trip to the police department where he was taken up to the fourth floor. He was left in a room for approximately thirty to forty minutes and then transferred to an interrogation room. The handcuffs were taken off during the interrogation.

The interrogation began shortly before 11:00 P.M. and was conducted by Detectives G. E. Murphy and Jerry Wiggins, after Miranda warnings, for an hour (PHT 15). During the course of the interrogation, Radke was questioned about his whereabouts on the evening of the 21st of January and whether or not he had anything to do with the Rudiger murder. During the interrogation, Radke was searched and keys, game tokens, and a battery were seized from his coat pocket. Towards the end of the interrogation, Sgt. Manis entered the room and had Radke execute a consent form for the search of the Toyota Celica (PHT 15, 37,). He accused Radke of being involved in the Rudiger murder. Radke asked for an attorney and questioning terminated. Radke was removed to another area of police headquarters where he was photographed and told to give samples of blood, breath, urine, and fingernail scrapings, as well as fingerprints, handwriting exemplars, and hair.

[3/] The impounding officer filed a report that "Mark Radke was arrested for homicide. He was taken to the homicide office for questioning. The vehicle was impounded and taken to Central P-2 level parking homicide cage per Sgt. Manis."

At the conclusion of the processing, Radke was transported to his residence.

A subsequent search of Radke's Toyota automobile revealed alleged bloodstains on a cardboard visor in the trunk, on the front driver's floormat area, and on the inside area of the left front fenderwell. Subsequent analysis by the police department lab indicated that some of the bloodstains were the victim's type "A", with enzyme PGM 2-1. Radke's blood is type O. Seized from Radke during his interrogation was his grey jacket and two Chuck-E-Cheeze tokens. The jacket and tokens had red stains which later tested presumptively for blood. On the basis of this information, police sought a search warrant for Radke's home. The warrant was executed on the second day of February, 1988. Radke's home was searched and he was arrested for the murder of Jeffrey Rudiger.

REASONS WHY PETITION SHOULD BE DENIED

1. There is no reason for this Court to review the unpublished decision of an intermediate state court of appeal when the decision is based upon a factual finding with no applicability beyond the instant case.

2. The California Court of Appeal complied with Dunaway v. New York (1979) 442 U.S. 200 [60 L.Ed.2d 824] where respondent was seized, without probable cause, for the purpose of custodial interrogation in violation of the Fourth Amendment.

ARGUMENT

1. THERE IS NO REASON FOR THIS COURT TO REVIEW THE UNPUBLISHED DECISION OF AN INTERMEDIATE STATE APPELLATE COURT WHEN THE DECISION IS BASED UPON A FACTUAL FINDING WITH NO APPLICABILITY BEYOND THE INSTANT CASE.

The Court will generally deny certiorari when a lower court decision turns upon the analysis of the particular facts involved (United States v. Johnston (1925) 268 U.S. 220, 227 [69 L.Ed 925]).

Petitioner herein is seeking review of adverse factual findings that have no effect beyond the instant case. The California Court of Appeal decision was unpublished and may not be cited as precedent without violating California rules of court (Rule 977, California Rules of Court).

There are no special or important reasons for this court to exercise it's discretion and grant review on writ of certiorari.

2. THE CALIFORNIA COURT OF APPEAL COMPLIED WITH DUNAWAY V. NEW YORK (1979) 442 U.S. 200 [60 L.ED. 2D 824] WHERE RESPONDENT WAS SEIZED WITHOUT PROBABLE CAUSE FOR THE PURPOSE OF CUSTODIAL INTERROGATION, IN VIOLATION OF THE FOURTH AMENDMENT.

This case does not, as suggested by the petitioner, fall within the provisions of Rule 17.1(c) of the Rules of the Supreme Court of the United States. The California Court of Appeal did not decide a federal question in a way in conflict with applicable decisions of the Court. In reaching it's decision, the California Court relied upon and adhered to the principle of Dunaway v. New York (1979) 442 U.S. 200, Supra which condemns as a violation of the Fourth Amendment police seizure of an individual without probable cause, for purposes of custodial interrogation.

Although the California Court of Appeal relied on Dunaway in

reaching it's decision (slip opinion at A-3), petitioner failed to distinguish or cite Dunaway in their petition for certiorari.

California courts are bound by federal search and seizure law (In re Lance W. (1985) 37 Cal.3d 873 [694 P.2d 744]), (People v. Brown (1985) 169 Cal.App.3d 159 [215 Cal. Rptr. 101]), including Dunaway (Lozoya v. Superior Court (1987) 189 Cal.App.3d 1332) [235 Cal. Rptr. 77].

There is no conflict between federal and California law on the issue of seizures without probable cause for the purpose of custodial interrogation.

An encounter between a police officer and a citizen implicates the Fourth Amendment when the officer seizes the citizen (Terry V. Ohio, (1968) 392 U.S. 1 [20 L.Ed. 2d 889]). A suspect is seized within the meaning of the Fourth Amendment if the police act to compel a response, act in a coercive manner or restrict a person's freedom of movement. This includes a suspect who is forcibly stopped by police officers (Brown v. Texas, (1979) 443 U.S. 47 [61 L.Ed.2d 357]). A seizure occurs when a reasonable person would believe he is not free to leave (United States v. Mendenhall, (1980) 446 U.S. 544, 554 [64 L.Ed.2d 497]). A forcible stop of a car constitutes a seizure (Delaware v. Prouse, (1979) 440 U.S. 648, 653) [59 L.Ed.2d 660]) as does the surrounding of a suspect by three police cars (United States v. Pavelski, 789 F.2d 485, 488-89 (7th Cir. 1986) (See also United States v. Ceballos (1981) 654 F.2d 177, 184.)

A seizure must be supported by probable cause unless it falls within a narrow exception to the probable cause requirement reserved for police activity that does minimal violence to the "sanctity of the person." (Dunaway v. New York, (1979) 442 U.S. 200 Supra (quoting Terry v. Ohio, (1981) 392 U.S. 1, 20 Supra.)

This Court has outlined a number of factors for determining whether a seizure amounts to an arrest. These factors include

the freedom of the suspect to leave, the duration of the seizure and transportation of the suspect for custodial interrogation.

In Dunaway v. New York, (1979) 442 U.S. 200 Supra, the Court held that a person who accompanied police officers to a police station for purposes of interrogation undoubtedly "was `seized' in the Fourth Amendment sense," (Id. at 207), even though "he was not told that he was under arrest." (Id. at 203.) The issue was whether the station house detention on less than probable cause for the purpose of interrogation violated the defendant's Fourth Amendment right to be free from an unreasonable seizure. The Court recognized that the nature of the defendant's detention was critical in determining whether a seizure had occurred and emphasized both the length and the involuntariness of Dunaway's seizure.

> [T]he detention of petitioner was in important respects indistinguishable from a traditional arrest. Petitioner was not questioned briefly where he was found. Instead, he was taken from a neighbor's home to a police car, transported to a police station, and placed in an interrogation room. He was never informed that he was free to go"; indeed, he would have been physically restrained if he had refused to accompany the officers or had tried to escape.

(Id. at 212.)

Likewise, moving a suspect to the station merely for fingerprinting requires probable cause (Hayes v. Florida, (1985) 470 U.S. 811, 816 [84 L.Ed.2d 705]), Davis v. Mississippi, (1969) 394 U.S. 721, 728 [221 L.Ed2d 676].

Here, respondent was not detained for a brief period of time, he was seized for a custodial interrogation. The California Superior Court, although it denied respondent's motion to suppress evidence, found the police had an unlawful purpose

when they stopped respondent's car.4/

Petitioner, rather than addressing this finding, and at the same time ignoring the appellate court's reliance on Dunaway, argues the Court of Appeal decision is in conflict with United States v. Hensley (1985) 469 U.S. 221 [83 L.Ed.2d 604].

Hensley, which cites Dunaway with approval (United States v. Hensley, Supra at 226), is factually distinguishable and generally inapplicable to the case sub judice.

Unlike Hensley, the record here is devoid of any testimony that detectives suspected respondent was armed, dangerous, or in the act of committing a crime. Nor was there any desire on the part of the police to question respondent at the scene5/ (See Terry v. Ohio (1968) 392 U.S. 1, Supra.)

Finally, Petitioner submits respondent's hands were personal characteristics exposed to public view, unprotected by the Fourth Amendment, but overlooks the fact that the police would never have seen respondent's hands but for their unlawful seizure. Their observations were a direct product of the primary illegality, the unlawful seizure, and were properly excluded

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4/"You can argue that the intent to take the defendant to the station, which intent was harbored at a time there was not probable cause, renders everything subsequent to the detention unlawful. And I think you have the better of it on the proposition that the officers did harbor what after the fact we can conclude was an unlawful intent when they stopped the car. They did testify that they planned to take the defendant down to the station, which was something they had no right to do without probable cause. And they didn't think they had probable cause." [RT 10-11]

Petitioner conceded in the Courts below that there was no probable cause at the time the respondent's car was stopped.

5/In the Superior Court, petitioner conceded that it was "the apparent intention of Detective Manis to take defendant into temporary custody for the purposes of questioning him and gathering available evidence." (Petitioner's points and authorities in opposition to defendant's motion to suppress evidence at 8).

(Brown v. Illinois (1975) 422 U.S. 590 [45 L.Ed.2d 416]).

CONCLUSION

The California Court of Appeal, adhering to decisions of the U.S. Supreme Court, found respondent was seized without probable cause in violation of the Fourth Amendment.

On petition for certiorari, petitioner essentially challenges the adverse factual finding of an intermediate state appellate court. The court opinion, unpublished, may not be cited as precedent and has no effect beyond the instant case.

The California Supreme Court, in denying review, left the Court of Appeal decision intact.

There are no special or important reasons for this Court to grant review, and the petition should be denied.

Dated: [illegible]

Respectfully submitted,

DOUGLAS COLTON BROWN
Attorney for Respondent

FILED
DEC 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-914

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

MARK ALAN RADKE,
Respondent.

On Petition for Writ of Certiorari
To the California Court of Appeal
Fourth Appellate District, Division One

PETITIONER'S REPLY BRIEF

EDWIN L. MILLER, JR.
District Attorney of
the County of San Diego
PETER C. LEHMAN
Deputy District Attorney
THOMAS F. MCARDLE
Deputy District Attorney

101 West Broadway, Suite 700
San Diego, California 92101
Telephone: (619) 531-3577
Attorneys for Petitioner

Bowne of Los Angeles, Inc., Law Printers. (213) 742-8600

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No. 88-914

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1988

THE PEOPLE OF THE STATE OF CALIFORNIA,
Petitioner,

VS.

MARK ALAN RADKE,
Respondent.

On Petition for Writ of Certiorari
To the California Court of Appeal
Fourth Appellate District, Division One

PETITIONER'S REPLY BRIEF

Petitioner, The People of the State of California, respectfully replies to Respondent's Brief as follows.

SUPPLEMENTAL STATEMENT OF THE CASE

At the time the instant petition was prepared, the California Court of Appeal had stayed the issuance of its remittitur until December 3, 1988. Since that time the Court of Appeal has successively stayed the issuance of its remittitur to December 15, 1988, and to January 18, 1989.

In his Statement of the Case Respondent notes that he filed a motion to suppress evidence in the Municipal Court prior to the preliminary hearing in this case, and that Petitioner did not file a response at that time.

Petitioner points out, however, that under the state's statutory scheme as set forth in California Penal Code section 1538.5, neither party is required to file a written pleading in connection with a motion to suppress evidence at the preliminary hearing. Thus, the presence or absence of a written pleading by one or both of the parties is meaningless.

Moreover, the Court of Appeal opinion challenged by Petitioner did not deal with the ruling made at the preliminary hearing. Instead, it dealt with, and vacated, the subsequent order of the Superior Court which had denied Respondent's motion to suppress. Thus, although Respondent's motion was denied at both the preliminary hearing and the later Superior Court hearing, only the latter is material here.

In a similarly irrelevant vein Respondent refers to a declaration which he filed prior to the preliminary hearing and in which he claimed the police pointed guns at his head. However, that document was inadmissible hearsay which was never offered nor received in evidence at any stage of this case, and Petitioner therefore had no occasion to object to it. It was meaningless then and remains meaningless now.

ARGUMENT

I

REVIEW SHOULD NOT BE DENIED ON THE GROUND THE OPINION OF THE CALIFORNIA COURT OF APPEAL IS UNPUBLISHED.

Respondent contends review should be denied because the opinion is unpublished and, therefore, cannot properly be cited as precedent.

Respondent is wrong. This Court often grants review by certiorari notwithstanding the fact the opinion under review is unpublished (See, *e.g., Rhodes v. Stewart* (1988) 488 U.S. ____ (102 L.Ed.2d 1); *Griffith v. Kentucky* (1987) 479 U.S. ____ (93 L.Ed.2d 649); *Rose v. Clark* (1986) 478 U.S. 570 (92 L.Ed.2d 460)).

Nonpublication is irrelevant to this Court's decision to grant or deny review. Thus, in granting certiorari recently in a tax case, the Court stated in *Commissioner v. McCoy* (1987) 484 U.S. ____ (98 L.Ed.2d 2, 7),

> "We note in passing that the fact that the Court of Appeals' order under challenge here is unpublished carries no weight in our decision to review the case. The court of Appeals exceeded its jurisdiction regardless of nonpublication and regardless of any assumed lack of precedential effect of a ruling that is unpublished.
>
> "Certiorari is therefore granted and the order of March 2, 1987, is reversed."

Accordingly, Respondent's contention must be rejected.

II

REVIEW SHOULD NOT BE DENIED ON THE GROUND PETITIONER IS SEEKING REVIEW OF ADVERSE FACTUAL FINDINGS.

Respondent contends review should be denied because Petitioner is merely seeking review of adverse factual findings. That contention is wrong.

The facts in this case are set out plainly in the petition. Respondent does not dispute any of those facts. However, he does attempt to confuse the facts by referring improperly to the thought processes of the police. The irrele-

vance of such matters was clearly established in *Berkemer v. McCarty* (1984) 468 U.S. 420, 442 (82 L.Ed.2d 317, 336):

> "Although Trooper Williams apparently decided as soon as respondent stepped out of his car that respondent would be taken into custody and charged with a traffic offense, Williams never communicated his intention to respondent. *A policeman's unarticulated plan has no bearing on the question* whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable man in the suspect's position would have understood his situation." (emphasis added).

The petition in this case simply asks this Court to decide, based on undisputed facts, whether the California Court of Appeal respected this Court's criteria in determining the reasonableness of the police seizure in this case. That question is properly presented to this Court. As stated in *Ker v. California* (1963) 374 U.S. 23, 33-34 (10 L.Ed.2d 726, 738),

> "Findings of reasonableness, of course, are respected only insofar as consistent with federal constitutional guarantees. As we have stated above and in other cases involving federal constitutional rights, findings of state courts are by no means insulated against examination here. (Citations omitted) While this Court does not sit as in nisi prius to appraise contradictory factual questions, it will, where necessary to the determination of constitutional rights, make an independent examination of the facts, the findings, and the record so that it can determine for itself whether in the decision as to reasonableness the fundamental — *i.e.*, constitutional — criteria established by this Court have been respected."

As stated in the petition, the California Court of Appeal's decision on reasonableness in this case is in conflict with applicable and binding decisions of this Court. Moreover, this case gives the Court an opportunity to establish unmistakably that a police observation of a suspect in a public place is not subject to exclusion under the Fourth Amendment even if the observation was made during a detention which in some respects may have been unreasonable.

Review should be granted because this case involves two recurring questions under the Fourth Amendment: when does a suspect have a reasonable expectation of privacy? and, what protective measures may police reasonably take during a detention? This case presents those questions in an interrrelated form which reflects the complexity of circumstances in which policemen commonly find themselves. Law enforcement officers need the guidance of this Court in such matters. Accordingly, review should be granted.

III

THIS CASE IS NOT CONTROLLED BY *DUNAWAY V. NEW YORK.*

In *Dunaway v. New York* (1979) 442 U.S. 200 (60 L.Ed.2d 824) police received a tip from a jail inmate which implicated Dunaway in a murder, but it did not supply probable cause to arrest him. Nevertheless, the police took him into custody at his neighbor's home and transported him to the police station for questioning. Dunaway was not told that he was under arrest nor, apparently, that he was not under arrest.

The state conceded the seizure was not supported by probable cause. However, it argued a suspect may be taken to a police station for custodial interrogation on the

basis of a "reasonable suspicion" amounting to less than probable cause.

This Court held the police action was not a lawful detention within the meaning of *Terry v. Ohio* (1968) 392 U.S. 1 (20 L.Ed.2d 889) because the suspect was not merely questioned where he was found. Instead, the seizure was indistinguishable from a traditional arrest. Whether or not it was technically an arrest, the seizure so severely intruded on interests protected by the Fourth Amendment that probable cause was required to justify it. In short, this Court held a suspect cannot be transported by police to a police station without probable cause. The Court did not decide whether any detention would have been permissible in that case.

The instant case is completely different. The California Court of Appeal found the detectives had sufficient information, before stopping the suspect, to justify detaining and briefly questioning him at the scene of the stop (Petition, Appendix A, page A-3). Respondent does not argue to the contrary. Moreover, unlike the facts in *Dunaway v. New York, supra,* Detective Manis expressly told Mr. Radke he was *not* under arrest.

In addition, and more importantly, the Court of Appeal found the observation of Radke's hands at the scene of the stop on the highway gave the police probable cause to arrest him: "both parties concede this evidence (the hand injuries) along with that giving rise to the initial suspicion when taken together provide *probable cause for arrest*" (Petition, Appendix A, pages A-3 to A-4; emphasis added).

Thus, the transportation of Radke to the police station for questioning met the requirement of *Dunaway v. New York, supra,* that such a seizure be made only if it is justified by probable cause.

The California Court of Appeal did not hold to the contrary. Instead, it held the police acted unreasonably in displaying a weapon, ordering the suspect out of his car, and placing handcuffs on him. It held those actions transformed what should have been a lawful detention into an illegal arrest without probable cause.

The Court of Appeal impliedly assumed the suspect had a reasonable expectation of privacy in the appearance of his hands in a public place. It impliedly held his privacy was unreasonably violated by the handcuffing. Accordingly, it ordered the exclusion of the police observation of the suspect's hands.

In determining the legality of the arrest, the Court of Appeal subtracted the police observation of the hands from the totality of their knowledge, and concluded the remainder fell short of probable cause. Thus, the Court used a sleight of hand calculation of probable cause: now you see it, and now you don't. In *Dunaway v. New York, supra,* the police never had probable cause prior to transporting the suspect. Thus, that case does not control this one. Here, the police had probable cause, but the Court of Appeal held they could not use it to arrest the suspect because part of the information was not obtained properly.

Respondent, citing *Wong Sun v. United States* (1963) 371 U.S. 471 (9 L.Ed.2d 441), defends the Court of Appeal's decision by contending the evidence of Radke's hand injuries would not have come to light but for the illegal handcuffing, and thus the evidence must be excluded. Petitioner disagrees.

Respondent's contention is nothing more than an attempt to resurrect the "but for" argument which was repudiated by the Wong Sun case itself. The more apt consideration is whether the evidence was acquired by

means significantly distinguishable from the allegedly illegal act of handcuffing the suspect.

The handcuffing and the police observation of the injured hands are easily and significantly distinguished. The handcuffing impinged on the suspect's interest in liberty, whereas the observation of the hands did not impinge on any constitutionally protected interest under the circumstances. The legal right of the police to observe the suspect's hands in a public place did not depend upon the existence of a reasonable suspicion, probable cause, or any other criteria.

Moreover, the factual ability of the police to view the suspect's hands did not depend upon the handcuffing, but instead upon the suspect's display or exposure of his hands in a public place. Thus, the detective's use of his eyes to see evidence in plain sight in a public place was a means constitutionally distinguishable from the use of his hands to handcuff the suspect. The observation was essentially passive and nonintrusive, whereas the handcuffing involved an active and intrusive assertion of authority over the suspect. Accordingly, Respondent's argument must be rejected, and review should be granted.

CONCLUSION

This case is one of great interest and importance not only to the parties directly involved, but also to the law enforcement community, the community at large, and all persons who have an interest in the fair and orderly administration of justice. Unfortunately, the decision of the Court of Appeal threatens to prevent a trial on the merits. It threatens to set loose an accused murderer on a "technicality". Such a result smacks of gamesmanship and is well-calculated to erode public confidence in the judicial system.

This case, of course, does not involve mere technical issues of legal procedure. Instead, it involves serious issues of constitutional magnitude. Accordingly, for the reasons stated in the petition and herein, Petitioner respectfully prays that review be granted.

Dated: December 20, 1988

Respectfully submitted,

EDWIN L. MILLER, JR.
District Attorney of the
County of San Diego,
State of California
PETER C. LEHMAN
Deputy District Attorney

By: THOMAS F. MCARDLE
Deputy District Attorney
Attorneys for Petitioner

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 1706 Maple Avenue, Los Angeles, California.

On December 20, 1988, I served the within Petitioner's Reply Brief in re: "The People of the State of California vs. Mark Alan Radke" in the United States Supreme Court, October Term, 1988, No. 88-914;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Los Angeles, California, addressed as follows:

Douglas C. Brown
Attorney at Law
2725 Congress Street
Suite 1-D
San Diego, California 92110
Counsel for Respondent

All Parties required to be served have been served.

I certify, under penalty of perjury, that the foregoing is true and correct.

Executed on December 20, 1988, at Los Angeles, California

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